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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re Marriage of CATHY and STEPHEN
HANKINS.

2d Civil No. B208533
(Super. Ct. No. D260970)
(Ventura County)

DAVID WAGNER,

Respondent,

v.

STEPHEN HANKINS,

Appellant.

Stephen Hankins (Hankins) appeals an April 10, 2008 order denying his claim of exemption to a wage garnishment initiated by David Wagner, the assignee of a money judgment against Hankins by his former wife, Cathy Hankins. We conclude, among other things, that Hankins has not produced an adequate record on appeal and has not shown error. We affirm.

FACTS

Hankins' former wife obtained a money judgment against him which he did not pay. She assigned the judgment to Wagner who obtained a garnishment levy on Hankins' wages.

Hankins filed a claim of exemption in 2007 to the wage garnishment. The trial court denied it. This was the subject of Hankins' prior appeal. (*In re Marriage of Hankins* (Oct. 20, 2008, B204373) [nonpub. opn.].) In that case we remanded the matter to the trial court with instructions to make additional factual determinations. (*Ibid.*)

In 2008, Hankins filed another claim of exemption, which is the subject of the current appeal. In his declaration in support of the claim of exemption, Hankins said, among other things, that his gross monthly pay was \$8,000, that he paid \$2,600 a month for rent and he supported himself, a wife and two young children. His financial declaration reflects that the family owned three cars, including a 2007 Honda Odyssey, a 2007 Honda Pilot and a BMW. Hankins said that all of his earnings were necessary to support himself and his family.

Wagner filed a notice of opposition to the claim of exemption and a notice of hearing. At the hearing Wagner requested the court to review a "packet" of documents which he had filed in opposition to the claim of exemption. He said that Hankins was "claiming . . . that he pays rent of \$2,600 a month. [His] investigation found he is living with his in-laws and he pays no rent at all." Hankins responded and denied that he had falsified his monthly expense claim.

Wagner again referred the court to the documents that he had filed in opposition which included a previous declaration by Hankins. Wagner said that a review of the documents showed inconsistencies involving expenditures that Hankins had claimed. Wagner said that a few months earlier, "Hankins owned a 2006 Honda that he paid \$612 a month for. He had a 2004 Honda Odyssey that he paid \$555 a month for. Today he does not own those cars. He owns two 2007 brand-new automobiles he pays almost \$1,600 a month for."

Wagner said that a few months earlier, when Hankins owned a home, Hankins said he was paying \$150 a month for utilities and telephone. "Now that he is renting, he is claiming \$400 more per month" Wagner said, "And most glaring of all, Your Honor, installment payments of six months ago on his credit card debt is \$470. Today his installment debt is \$2,521. [¶] Your Honor, if he can afford to buy new cars,

if he can afford to run up \$2,000 per month in installment debt, I believe he can afford to pay down this \$100,000 debt that he owes his former spouse from ten years ago."

The court took the matter under submission. It denied the claim of exemption. In its ruling, the trial court said, "The Court does not believe that all of [Hankins'] claimed, but unsubstantiated, income is necessary to provide for the needs of his family, and the claim is denied. The court further finds that the garnishment does not exceed the limits imposed by State or Federal legislation."

DISCUSSION

I. *The Claim of Exemption and Wage Garnishment*

Hankins contends the trial court erred by denying his claim of exemption.

California's wage garnishment law "limits the amount of earnings which may be garnished in satisfaction of a judgment" (*California State Employee's Assn. v. State of California* (1988) 198 Cal.App.3d 374, 377.) Generally a garnishment may not exceed 25 percent of a worker's "disposable earnings." (15 U.S.C. § 1673; *Barnhill v. Robert Saunders & Co.* (1981) 125 Cal.App.3d 1, 6.) But the debtor may file a claim of exemption to show that the garnishment should be ended because the funds subject to levy are needed to support the debtor's family. (Code Civ. Proc., §§ 703.520, 703.530, 706.105.) A judgment creditor may file an opposition. (*Id.*, §§ 703.550, 703.560, 706.105.) The court decides whether to grant the claim of exemption based on the declarations of the parties and any evidence presented at the hearing. (*Id.*, § 703.580.)

There must be an adequate record of the trial court proceedings to determine whether the court correctly ruled on the exemption claim. That includes all the documents the court reviewed. The record Hankins produced is incomplete. He prepared an appellant's appendix, which includes documents he relied on, but it excludes all the opposition documents Wagner filed. The trial court, however, took this matter under submission to review the documents that *both* parties had filed.

Hankins "has the burden of proof on appeal." (*Pringle v. La Chapelle* (1999) 73 Cal.App.4th 1000, 1003.) "[A]n appellant "must affirmatively show error by

an adequate record. . . . Error is never presumed. . . . 'A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent'" (Null v. City of Los Angeles (1988) 206 Cal.App.3d 1528, 1532.) Where the record is incomplete, we must presume that the trial court correctly relied on matters that are not before us. (Pringle, at p. 1003.) Because the record Hankins produced is incomplete, it is not adequate for appellate review. Consequently we must affirm the trial court's decision. (Ibid.; Null at p. 1532.)

But there are additional reasons why the trial court's order must be sustained. As Wagner notes, Hankins did not make an argument in his brief, or cite to the record, to demonstrate how the trial court erred by finding that he had available income to pay the judgment. This issue is consequently waived on appeal. (Baxter Healthcare Corp v. Denton (2004) 120 Cal.App.4th 333, 368.)

But, even so, Hankins also does not prevail for other reasons. The gross annual family income was \$96,000, and Wagner had challenged the accuracy of Hankins' claimed monthly expenses. The record does not contain Wagner's documents or his declaration. But from the transcript of the hearing, it is evident the monthly expenses were contested factual issues, and that Wagner was challenging Hankins' credibility. Wagner questioned how the family could buy new cars and then claim financial hardship in light of the size of the annual family income. He suggested that the utility, telephone, rent and credit card installment figures in Hankins' declaration were inflated or not accurate. He asked the court to review prior sworn financial statements by Hankins to evaluate the truthfulness of his current declaration. By denying the claim of exemption, the trial court necessarily resolved these disputed expense and credibility issues in Wagner's favor. The credibility of declarants is a matter within the sound discretion of the trial court; appellate courts do not decide credibility. (Cody v. Von's Grocery Co. (1961) 189 Cal.App.2d 329, 333.)

II. *The Impact of the Prior Appeal*

Hankins contends that this 2008 order which denied his claim of exemption is invalid because of our decision in his first appeal. He claims that in his first appeal (*In*

re Marriage of Hankins, supra, B204373), we decided that his first claim of exemption in 2007 should have been granted because Wagner did not timely file an opposition.

But Hankins has misstated our ruling. In the first appeal, Hankins argued that Wagner's opposition to the 2007 claim of exemption was not timely and therefore the levy had to be released. We said, "The creditor normally loses the right to oppose the claim of exemption by not timely filing the opposition. (*Westervelt v. Robertson* (1981) 122 Cal.App.3d Supp. 1, 9)." (*In re Marriage of Hankins, supra*, B204373.) We also noted, "A creditor may obtain relief for a late filing of an opposition under section 473 where he did not receive actual notice of the claim of exemption or he otherwise had good cause for the late filing. (*Westerfield v. Robertson, supra*, 122 Cal.App.3d Supp. 1, 10, fn. 2.) *But these are issues that initially should be decided by the trial court.*" (*Ibid.*, italics added.)

We concluded, "The record on appeal is not complete. We do not have the proof of service or the levying officer's notice of claim of exemption. But from the documents we have, it appears that Hankins' position *may* have merit." (*In re Marriage of Hankins, supra*, B204373, italics added.) We, however, did not decide the timeliness or good cause issues. Instead we remanded the matter to the trial court with the following instructions: "The court shall determine whether the creditor's opposition was timely, and, if not, whether there was good cause for a late filing. If the opposition was timely, or if there was good cause for its late filing, the claim of exemption shall be denied. If it was untimely and without good cause for delay, the funds subject to levy shall be released and the court shall determine the refund or credit owed to Hankins for the amount of funds subject to execution during that levy." (*Ibid.*)

Our decision in this appeal does not alter the remand order in the prior appeal. The trial court retains jurisdiction to award Hankins all the relief to which he is entitled if Wagner's 2007 opposition was untimely and without good cause. Here we simply conclude that Hankins has not shown reversible error on this record.

Hankins also claims that the trial court erred by denying his motion to stay proceedings. But such motions are addressed to the sound discretion of the trial court.

(*Avant! Corp. v. Superior Court* (2000) 79 Cal.App.4th 876, 888-889.) Hankins has not shown an abuse of discretion.

The judgment is affirmed. Costs on appeal are awarded in favor of respondent.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

COFFEE, J.

Ellen Gay Conroy, Commissioner
Superior Court County of Ventura

Stephen Hankins, in pro. per., for Appellant.

David Wagner, in pro. per., for Respondent.